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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 301

C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and As Representative of Her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi,

Petitioners,

vs.

THE CONGRESS OF RACIAL EQUALITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact and conclusions of law of the District Court for the Southern District of Mississippi are appended to the petition. The opinion of the Court of Appeals for the Fifth Circuit, together with the dissenting opinions, is reported in __ F. 2d __, and is appended to the petition.

JURISDICTION

The jurisdictional requisites are adequately stated in the petition.

STATEMENT OF FACTS

On Monday, November 27, 1961, a preliminary injunction was issued by a statutory three-judge Court, sitting in the Southern District of Mississippi. 6 Race Rel. Rep. 1161. The order generally enjoined the Mayor and Selectmen of McComb City from interfering in any way with compliance by the Greyhound Corporation with the laws of the United States and the regulations of the Interstate Commerce Commission prohibiting racial discrimination in the facilities of interstate commerce (R. 23, 27, 36).

On Tuesday, November 28th, "White Only" signs were removed from the bus terminal (R. 93).

On the same day, the Chief of Police of McComb City learned from an agent of the Federal Bureau of Investigation that negro members of Congress of Racial Equality (hereinafter "CORE") would visit the city on the following day (R. 204-8). The next morning, when a group of five negroes arrived by bus at the depot a large crowd had already gathered (R. 71, 73, 77, 136). On that occasion, police were not present in the bus station (R. 127).

The negroes found the bus terminal restaurant closed presumably because of a gas leak (R. 73). The group left, but returned shortly after 3 P.M. (R. 207). They entered the terminal and went to the "white" lunch counter, sat and requested service from Aubrey McGehee, co-appellee and lessee of the restaurant facilities (R. 140). Mr. McGehee testified he had never served colored people before, nor had any "white" restaurant in McComb (R. 142, 148).

McGehee's testimony indicated that he informed the group that his restaurant was . . . "not connected with

Greyhound", and that if they would go to the "colored part . . . a woman of your color will serve you anything you want over there" (R. 140-1). He also stated that one of the women in the group asked belligerently why they couldn't "get service here" (R. 141, 144). There was no testimony as to any other belligerent conduct (R. 74).

Almost immediately thereafter, in McGehee's words, "all hell broke out" (R. 115). The negroes were forcibly ejected from the terminal by members of the crowd (R. 85). There was testimony that if the police had been present, they could have prevented the incident (R. 209-210). On the following day, as a result of that incident, four residents of McComb were arrested for "disturbing the peace" (R. 86, 101).

The same day, after receiving a telegram from the Justice Department (R. 218) requesting police protection at the terminal, the Selectmen of the city authorized the police to patrol the terminal on a regular basis (R. 103-4, 209).

On Friday a field representative of CORE met the 1:30 bus from New Orleans (R. 175) and picked up a group of five negro passengers (R. 178) without incident (R. 178-9). The negroes returned to New Orleans on the 3:30 bus (R. 185).

On Saturday, December 2nd, the field representative of CORE met negro passengers, all natives of McComb (R. 182) who had arrived from Jackson, Mississippi. The negroes left the bus and used the terminal without incident (R. 187), and in a quiet manner (R. 206) but as they entered the auto of the CORE representative a crowd that had gathered beat the auto with fists and brass knuckles,

kicked the sides and attempted to break the window of the car (R. 188). A police officer intervened and the beating stopped (R. 188).

On the same day a complaint by the City of McComb and Mr. and Mrs. Aubrey McGehee was filed against CORE and John and Mary Doe as defendants (R. 2). A temporary restraining order was signed by District Court Judge Mize (R. 46) and after a hearing before Judge Harold Cox, a preliminary injunction was issued on December 22nd, 1961 (R. 242) enjoining defendant CORE and its officers, agents, servants, employees and attorneys, from "sponsoring, encouraging or financing persons to use the terminal facilities located in the city of McComb City * * * for the purpose of fomenting violence or provoking breaches of the peace in or near said terminal facilities" (R. 245). On appeal, the Court of Appeals for the Fifth Circuit reversed, and it is the latter judgment of which petitioners seek review in this Court.

QUESTIONS PRESENTED

a. Does a peaceful use of interstate bus facilities by small groups of members of Congress of Racial Equality present a clear and present danger of disturbance of the peace?

b. Is an injunction against a peaceful use of interstate bus facilities a prior restraint on freedom of speech?

c. May Congress of Racial Equality assert the rights of freedom of speech and assembly?

d. Did the Court of Appeals apply the proper scope of review of the facts in holding that in order to reverse, it must find that the trial court abused its discretion?

ARGUMENT

This petition for certiorari is one more dilatory tactic by the City of McComb, Mississippi, in a campaign to delay giving Congress of Racial Equality and its members the right freely to use interstate bus facilities at McComb. The "questions presented" are hardly questions at all; the allegations of law are without substance. The use of the bus facilities at McComb was completely peaceful on the part of members of CORE, there was no danger of any kind from CORE, let alone "clear and present" danger. The injunction was more than a simple interference with speech, it was a prior restraint of speech, as evidenced by the simple fact that members of CORE have not been in the McComb bus station since 1961. The assertion that CORE has no right of freedom of speech or assembly is contrary to all the decisions on the point in this Court. Finally, the statement that the court below applied the wrong standard of review is astonishing, since that court applied a standard laid down by this Court, and indistinguishable from the standard advocated in the petition herein.

No Substantial Question of First Amendment Rights Is Presented

There are no issues presented by this case with regard to the right of freedom of speech and assembly which have not been settled by previous decisions of this Court, as correctly interpreted by the Court of Appeals below.

a. There Is No Issue of Clear and Present Danger

The Court of Appeals correctly concluded that the decision in *Edwards v. South Carolina*, 372 U. S. 229 (1963)

controls this case. Here, as in that case, persons, in this case members of CORE, were assembled for purposes of a peaceful protest against segregation. In this case, as in that, a crowd had gathered to watch and possibly to interfere. In this case, as in that, the testimony was that the police, whenever they were present, were always able to control the crowd. This case differs from the *Edwards* case, if at all, only in the fact that in this case there was some little violence *against the defendants* on two occasions: on Wednesday, November 29, 1961, when negroes were ejected from the bus terminal by the crowd, and on Saturday, December 2, 1961 when the crowd attacked the car in which the protesting negroes were sitting. In the first case, there was testimony that the police could have prevented the violence if they had been present (R. 209), and in the second case they actually did disperse the crowd (R. 188). The mere fact that there has been a disturbance is not enough to justify interference by injunction, if the defendants have not caused or incited the disturbance. In *Terminiello v. City of Chicago*, 337 U. S. 1 (1949), the defendant had made a speech which caused a disturbance because of the violent opposition to it. This court reversed his conviction for disorderly conduct, saying:

> "Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and pre-conceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky v. N. H.,

> pp. 571-72, is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest." 337 U. S. at 4.

To argue otherwise is to deny the existence of free trade in ideas, the very basis of freedom of speech.

The Court of Appeals correctly ruled that there was no incitement to riot by the protest, as there was in the case of *Feiner v. New York*, 340 U. S. 315 (1951). Petitioners seem to argue (Petition p. 15) that publicity given to the use of the bus facilities by members of CORE would be tantamount to inciting to riot, but it is unnecessary to reach that question, because the Court of Appeals found that there was no showing on the record that CORE did publicize the protest (R. 66-71), or "widely advertise" it, as charged in the findings of fact of the trial court. The Court of Appeals said further:

> "* * * In any event, regardless of what the findings were with respect to the publicity, it is clear that, whatever part of the injunction is based on 'advertising' of the comings and goings of CORE, the injunction must be struck down. The publicity, even if provided originally by CORE, could only be said to be a part of their peaceful efforts to demonstrate. Any violence from the local citizenry which comes from this can only be said to be based on the offensiveness to them of CORE's intention to use McComb's facilities on an integrated basis, and their right to publicize their intentions is no less protected than their carrying them out." (Petition p. A16)

b. There Is No Question That the Injunction Is a Prior Restraint on Freedom of Speech

The petitioners argue that the Court of Appeals was in error in finding the temporary injunction a prior restraint on freedom of speech because the basis of the injunction, if any there be, was common law and Federal equity power, rather than statute. Petitioners attempt to distinguish *Thomas* v. *Collins*, 323 U. S. 516 (1945), in which this Court held a temporary restraining order to be a prior restraint on freedom of speech, on the ground that the order in that case was based on a statute. This is a useless distinction; in *Thomas* v. *Collins*, *supra* this court found a prior restraint on freedom of speech in the terms of the restraining order itself, though the statute might have been constitutional if properly applied. 323 U. S. at 528-529. In *Near* v. *Minnesota*, 283 U. S. 697, 714 (1931), this Court, in outlining the history of the rule against prior restraints on freedom of speech showed that prior restraints first arose when the courts enjoined libel *in the absence of statute*. If the reports are not replete with decisions on injunctions against speech issued pursuant to general equity power rather than pursuant to statute, it is because there has been no such distinction since the very inception of the rule against prior restraints on freedom of speech.

c. There Is No Question as to the Right of the Congress of Racial Equality to Raise an Issue of Freedom of Speech

The Court of Appeals held correctly that CORE might raise the Constitutional rights of its members under the decision of this court in *N. A. A. C. P.* v. *Alabama*, 357

U. S. 449 (1958).* This position has been consistently maintained by this court in that and other decisions. *N. A. A. C. P. v. Button*, 371 U. S. 415, 428 (1963); *Louisiana v. N. A. A. C. P.*, 366 U. S. 293, 296 (1961), and it has further been held that an organization such as CORE, which is directly engaged in activities of speech and assembly, may assert the right on its own behalf. *N. A. A. C. P. v. Button*, 371 U. S. 415, 428 (1963); *Grosjean v. American Press Co.*, 297 U. S. 233, 244 (1936). If the rule were as the petition states it (Petition p. 23), no incorporated publication or moving picture company could assert the right. Cf. *Kingsley International Pictures Corp. v. Regents of Univ. of New York*, 360 U. S. 684 (1959).

The quotation cited in the petition in support of this proposition (which is characterized as a statement of "this court"), is actually an extract from a separate opinion of Justice Stone, in which Justice Reed concurred, in *Hague v. C. I. O.*, 307 U. S. 496, 527 (1938), which states only that a corporation may not assert freedom of speech under the Privileges and Immunities Clause of the Fourteenth Amendment, because it is not a "citizen". It is not disputed that freedom of speech may be asserted under the Due Process Clause of the same amendment, see *Grosjean v. American Press Co.*, 297 U. S. 233, 244 (1936), and

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* This action was originally brought against "Congress of Racial Equality, John Doe and Mary Doe." It is plain, then, that petitioners originally intended this action to run against individuals, members of CORE, as well as against the organization. This step of the facts cannot be changed now by drawing the petition herein against CORE alone.

it is perfectly clear that the Court of Appeals did not base its opinion on the privileges and immunities clause, but on the Fourteenth Amendment generally.

There Is No Question That the Court Below Applied a Correct Standard of Review

Petitioners argue that the Court of Appeals determined the facts *de novo*, a procedure which is alleged to be improper on an appeal from a preliminary injunction. Yet the Court of Appeals stated the standard of review for this case in nearly the same terms that the petition has advocated:

> "Since this is an appeal from a preliminary injunction, and not a final ruling after a full hearing on the merits, we must review the district court's injunction on the narrow question of whether that court abused or improvidently exercised its discretion. * * *" (p. A9 of Petition)

This is the standard laid down by this Court in *Alabama v. United States*, 279 U. S. 229, 230 (1929); thus it seems that everyone, the petitioners, the Congress of Racial Equality, and this Court, is really in agreement as to the standard for review of facts by an appeals court. Surely there is no need for further review by this Court of such well-established principles.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted.

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